MANOHARAN MALAYALAM & ANOR A

v.

DATO' SERI MOHD NAJIB
TUN HJ ABDUL RAZAK & ORS B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ABDUL AZIZ RAHIM JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: W-01(NCVC)(W)-308-07-2012] C
14 JANUARY 2013

CIVIL PROCEDURE: *Locus standi - Declaration decree and relief against government - Allegation of violation of Federal Constitution - Whether adverse effect to personal rights must be shown - Federal Constitution, arts. 4, 8 & 12* D

The plaintiffs/appellants, who were advocates and solicitors, alleging that the Federal Government discriminated against the Tamil primary schools (national type) ('the schools') throughout the country, commenced a writ action for, *inter alia*: (i) a declaration that the practice of providing only nominal financial assistance to the schools as opposed to providing full financial assistance was contrary to arts. 4, 8 and 12 of the Federal Constitution ('the Constitution'); and (ii) a declaration that the operation of the schools in dilapidated and termite infested pre-independence wooden buildings that are unsafe for occupation and in overcrowded classrooms of more than 25 pupils per classroom, was contrary to arts. 8 and 12 of the Constitution. The plaintiffs thus, sought an order of *mandamus* to compel the Federal Government to provide full financial assistance to the 523 schools, in the same manner as the Federal Government provides to the national schools. The High Court, on the application by the defendants/respondents pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980, dismissed the plaintiffs' writ action on the grounds that the plaintiffs had no *locus standi*. The High Court held, *inter alia*, that (i) the plaintiffs' rights had not been affected; (ii) there was no 'special injury' caused in lodging the complaint; and (iii) the plaintiffs had not pleaded that their interest or rights had been affected but for their community as a whole. Hence, this appeal by the plaintiffs. E F G H I

Held (allowing appeal with costs)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) In a case where the complaint of the plaintiff is that the Federal Government or its agent has violated the Constitution by its action or legislation, he has the *locus* to bring an action to declare the action of the Federal Government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some special interest of his has been adversely affected. (*Robert Linggi v. The Government of Malaysia*, foll; *Government of Malaysia v. Lim Kit Siang*, not foll). The principle on the issue of *locus standi* concerned purely a situation where there is a *bona fide* complaint by a concerned citizen of a violation of the Constitution by the Government or its agent. (paras 17 & 24)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif/perayu-perayu, yang merupakan peguambela dan peguamcara, mendakwa bahawa Kerajaan Persekutuan telah mendiskriminasi sekolah-sekolah rendah Tamil (jenis kebangsaan) ('sekolah-sekolah tersebut') dalam seluruh negara, telah memulakan tindakan writ untuk, antara lain: (i) satu deklarasi bahawa amalan memperuntukkan hanya bantuan kewangan yang kecil kepada sekolah-sekolah tersebut, berbanding bantuan kewangan penuh, adalah bertentangan dengan perkara 4, 8 dan 12 Perlembagaan Persekutuan ('Perlembagaan'); dan (ii) deklarasi bahawa penjalanan sekolah-sekolah tersebut dalam bangunan-bangunan kayu pra-merdeka yang usang dan diserang anai-anai yang tidak selamat dihuni dan dalam bilik darjah yang sesak dengan lebih 25 murid dalam sebuah bilik darjah, adalah bertentangan dengan perkara 8 dan 12 Perlembagaan. Plaintif-plaintif, oleh itu, memohon untuk perintah *mandamus* untuk mewajibkan Kerajaan Persekutuan memperuntukkan bantuan kewangan penuh kepada 523 sekolah-sekolah tersebut, sama seperti yang Kerajaan Persekutuan peruntukkan kepada sekolah-sekolah kebangsaan. Mahkamah Tinggi, atas permohonan oleh defendan-defendan/responden-responden menurut A. 18 k. 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980, menolak tindakan writ plaintif-plaintif atas alasan bahawa plaintif-plaintif tidak mempunyai *locus standi*. Mahkamah Tinggi memutuskan, antara lain, bahawa (i) hak plaintif-plaintif tidak terjejas; (ii) tidak ada 'kerugian khas' yang berlaku dalam membuat laporan tersebut; dan (iii) plaintif-plaintif tidak

memplidkan bahawa kepentingan atau hak mereka terjejas tetapi hak masyarakat secara keseluruhan. Maka, rayuan ini oleh plaintif-plaintif.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Dalam kes di mana aduan plaintif adalah bahawa Kerajaan Persekutuan atau agennya telah mencabuli Perlembagaan melalui tindakannya atau perundangan, dia mempunyai *locus* untuk membawa tindakan untuk mengisytiharkan bahawa tindakan Kerajaan Persekutuan atau agennya sebagai tidak berperlembagaan, tanpa keperluan untuk menunjukkan bahawa kepentingan peribadinya atau kepentingan khasnya terjejas. (*Robert Linggi v. The Government of Malaysia*, diikuti; *Government of Malaysia v. Lim Kit Siang*, tidak diikuti). Prinsip atas isu *locus standi* berkaitan secara khusus kepada situasi di mana terdapat aduan *bona fide* oleh warganegara yang mengambil berat tentang pencabulan Perlembagaan oleh kerajaan atau agennya.

Case(s) referred to:
Boyce v. Paddington Borough Council [1903] 1 Ch 109 ***(refd)***
Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(not foll)***
Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC ***(refd)***
Rev Christopher Mtikila v. The Attorney-General Civil Case No: 5 of 1993 ***(foll)***
Robert Linggi v. The Government of Malaysia [2011] 7 CLJ 373 HC ***(foll)***
Tengku Jaffar Tengku Ahmad v. Karpal Singh [1993] 4 CLJ 183 HC ***(refd)***
The Society for the Protection of the Unborn Children (Ireland) Limited v. Diamond Coogan & Ors [1988] IR 734 ***(foll)***

Legislation referred to:
Federal Constitution, arts. 4(1), 8, 12, 161E(2)(b)
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the appellants - M Manoharan; M/s M Manoharan & Co
For the respondents - Effandi Nazila Abdullah, SFC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 21(NCVC)-17-02-2012]

Reported by S Barathi

A

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This appeal is against the decision of the High Court of Kuala Lumpur (Civil Division).

B

[2] On 20 June 2012 the High Court of Kuala Lumpur, pursuant to a striking out application by the respondents (the defendants before the High Court), dismissed the appellants' (the plaintiffs before the High Court) writ action seeking for
C declarations and certain orders pursuant to the Specific Relief Act 1950 and arts. 4, 8 and 12 of the Federal Constitution.

[3] The defendants' striking out application (pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980) was
D granted by the High Court purely on the issue of *locus standi*.

[4] We, on 14 January 2013, unanimously, allowed the appeal. We disagree with the learned High Court Judge on the issue of *locus standi*. We take the position that the appellants/plaintiffs have the *locus standi*.

E

[5] We now give our grounds.

[6] The complaints of the plaintiffs are as set out in the statement of claim. We will just summarise them. Essentially, the
F plaintiffs alleged that the Federal Government discriminates against Tamil Primary Schools (National Type) throughout the country (it is alleged that there are 523 of such schools with a pupil population of 120,000), in that the welfare of these schools is being neglected. These schools are not being given full financial
G assistance like the National Schools. Most of the Tamil Primary School buildings are old, and were pre-independence wooden buildings that are termite infested. They are in a dilapidated condition, unsafe for occupation. To add to the problem, there is overcrowding in the classrooms.

H

[7] The declarations and orders that the plaintiffs sought are as set out in the statement of claim. The declarations are as follows:

(a) A declaration that the practice of providing only nominal financial assistance to Tamil Primary Schools (National Type),
I as opposed to providing full financial assistance, as it is the practice in respect of National Schools, is contrary to arts. 4, 8 and 12 of the Federal Constitution.

(b) A declaration that the operation of Tamil Primary Schools (National Type) in dilapidated and termite infested pre-independence wooden buildings that are unsafe for occupation; and in overcrowded classrooms of more than 25 pupils per classroom, is contrary to arts. 8 and 12 of the Federal Constitution.

[8] As to the several orders sought, one of them is a prayer for a *mandamus* seeking to compel the Federal Government to provide full financial assistance to the 523 Tamil Primary Schools (National Type), in the same manner as the Federal Government provides to National Schools.

[9] Article 4(1) of the Federal Constitution provides:

> Supreme law of the Federation
>
> 4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.

[10] Article 8 of the Federal Constitution provides:

> Equality
>
> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishment or carrying on any trade, business, profession, vocation or employment.

[11] Article 12 of the Federal Constitution provides:

> Rights in respect of education
>
> 12. (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth:
>
> (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees;

A (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

B **[12]** The first and second plaintiffs are advocates and solicitors. The first plaintiff, besides being an advocate and solicitor, is also a state assemblyman. They alleged that the Federal Government unfairly discriminates against Tamil Primary Schools (National Type) throughout the country by denying such schools
C educational facilities and full financial assistance, causing the Indian community to be left far behind (as compared to other citizens) in terms of education; and this in turn led to high level of poverty among the Indian community in Malaysia.

D **[13]** The first defendant is the Prime Minister of Malaysia; whilst the second defendant is the Deputy Prime Minister cum Minister of Education.

[14] On the application of the defendants, pursuant to O. 18
E r. 19(1)(b) and (d) of the Rules of the High Court 1980, the High Court dismissed the plaintiffs' writ action on the grounds that the plaintiffs have no *locus standi*. This is what the learned High Court Judge said in his grounds of judgment:

F This Court is in the agreement with the submissions of the learned SFC that the plaintiffs have failed to show that they have *locus* to file this action.

(1) First, upon the question by this Court, the first plaintiff has candidly responded that his right has not been affected but
G he stands for the community as a whole and in particular, the Indian community.

(2) Secondly, the first plaintiff has also candidly conceded that there is no 'special injury' caused to him to lodge this complaint as pleaded in the summons but is filed on behalf
H of the Indian community.

(3) Thirdly, this Court also finds that the plaintiffs have not pleaded that their interest or rights has been affected but for their community as a whole. They chose to file this action because the first plaintiff is Wakil Rakyat (ADUN) and he
I is here for the interest of the community.

[15] The learned High Court Judge cited *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12. In this case, Abdul Hamid Omar CJ(M) (as he then was), said at p. 77 (CLJ); p. 27 (MLJ):

> This appeal raises an issue of considerable importance. The central issue revolves round the question of "*locus standi*" of a private person seeking a declaration and an injunction in a case for the enforcement of a public right purportedly for public interest.
>
> "*Locus standi*" is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a Court of law, if that Court recognizes his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.
>
> Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the Court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.

[16] The learned High Court Judge also relied on the cases of *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64 and *Tengku Jaffar Tengku Ahmad v. Karpal Singh* [1993] 4 CLJ 183; [1993] 3 MLJ 156.

[17] On our part, in the context of the present case, we prefer to adopt the approach as taken by David Wong J (as he then was) in *Robert Linggi v. The Government of Malaysia* [2011] 7 CLJ 373; [2011] 2 MLJ 741 that, in a case where the complaint of the plaintiff is that the Federal Government or its agent has violated the Federal Constitution by its action or legislation, he has the *locus* to bring an action to declare the action of the Federal Government or its agent as being unconstitutional, without the necessity of showing that his personal interest or some special interest of his has been adversely affected. The approach that we now take is essential if the constitutional principles that the

A constitution is the supreme law of the federation and that the courts are the protectors of the constitution are to have any effective meaning. In other words, what we are ruling is to the effect that in a case where the complaint of the plaintiff is that there has been a violation of the constitution by the Federal B Government or its agency, the *Lim Kit Siang* principles on *locus standi* do not apply.

[18] In *Robert Linggi* the plaintiff was a Sabahan. He complained of a breach by the Federal Government of the constitutional C provisions entrenched in art. 161E(2)(b) of the Federal Constitution. This article provides:

> (2) No amendment shall be made to the Constitution without the concurrence of the Yang di-Pertua Negeri of the State of Sabah and Sarawak or each of the States of Sabah and D Sarawak concerned, if the amendment is such as to affect the operation of the Constitution as regards any of the following matters:
>
> (b) the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and E suspension of judges of that court; ...

[19] He sought, among others, for a declaration that that the removal of the power of appointment of Judicial Commissioners to the High Court of Sabah and Sarawak by the respective Yang di-F Pertua Negeri and the setting up of the Judicial Appointment Commission under the Judicial Appointment Commission Act 2009 were unconstitutional and thus null and void.

[20] Before David Wong J, learned Senior Federal Counsel, for G the Government of Malaysia (the defendant), raised the issue of the *locus* of the plaintiff, citing the judgment of Buckley J in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109, and the judgment of Bowen CJ in *Rickards v. The Medical Benefit Fund of Australia Ltd* (unreported, 18 April 1975, referred to in *Declaratory Orders* H (2nd edn.) PW Young QC). David Wong J, however, rejected the argument of learned Senior Federal Counsel. The learned judge of the High Court of Kota Kinabalu ruled (at p. 397 (CLJ); p. 749 (MLJ)):

> I [6] With respect to counsel for the defendant, to adopt her contention would be taking a retro step in the law on '*locus standi*' in public law especially when there is a challenge to legislations made in contravention to the Federal Constitution. The Federal Constitution is the supreme law of the country and was drafted

> by the founding fathers of the country after taking into consideration the interests of all relevant parties prior to the formation of Malaysia. It is a document which belongs to all Malaysians irrespective of their race and standing in society and starting from that base, it must logically follow that all Malaysians had an entrenched right to litigate their grievance in Court when there was a perceived breach of the Constitution by the legislature.

[21] And, at a later part of his judgment, the learned judge said (at p. 382 (CLJ); p. 751 (MLJ)):

> [11] The plaintiff, as a Sabahan, in my view is genuinely concerned with the erosion of the rights of Sabah in so far as 'the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court' and since it concerns an attempt to uphold the Federal Constitution, I have no hesitation in finding that the plaintiff has the '*locus standi*' to bring this action. I am fully aware of the argument that this may encourage litigation but in my view when there is a challenge concerning any dismantling of the supreme law of the country, litigation should be encouraged. In any event, all Malaysians have a duty to protect our constitution.

[22] David Wong J found support in his judgment in the Tanzania High Court case of *Rev Christopher Mtikila v. The Attorney-General* Civil Case No: 5 of 1993 where it was held:

> The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and *bona fide* litigant even where he has no personal interest in the matter ... Given all these and other circumstances, if there should spring up a public-spirited individual and seek the courts intervention against legislation or actions that prevent the Constitution, the court's, as guardian and trustee of the Government and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual.

[23] Another case relied upon by David Wong J is the judgment of the Supreme Court of Ireland in *The Society for the Protection of the Unborn Children (Ireland) Limited v. Diamond Coogan & Ors* [1988] IR 734. Here, in this case, the Supreme Court of Ireland held:

> Every member of the public has an interest in seeing that the fundamental law of the state is not defeated, and although the courts are the ultimate guardian of the Constitution, such protection is possible only where their powers are invoked. Since breaches of constitutional rights may on occasion be threatened by the government itself or its agents, it would be intolerable if access to the courts to defend and vindicate such constitutional rights were confined to the attorney general as the very officer of state instructed to defend the government's position.

[24] With respect, we wholeheartedly adopt the above passages as quoted by David Wong J in the Tanzanian case of *Rev Christopher Mtikila* and in the Irish case of *The Society for the Protection of Unborn Children*. Lest we be misunderstood, we wish to stress here that the principle that we are enunciating in this judgment on the issue of *locus standi* concerned purely a situation where there is a *bona fide* complaint by a concerned citizen of a violation of the Constitution by the Government or its agent.

[25] We conclude our judgment by referring to and approving the following passage in the dissenting judgment of Abdoolcader SCJ in *Lim Kit Siang* (at p. 101 (CLJ); p. 45 (MLJ)):

> The effect of the denial of standing in such circumstances would be, and it has indeed be so suggested, that we will have to fold our arms and do nothing, in which event I would add we might also as well have to hang our heads in sorrow and perhaps even in mortification in not being able to at least entertain for consideration on its merits any legitimate complaint of a public grievance or alleged unconstitutional conduct. To take an instance: If a considerable sum of money is taken out by executive fiat from the Consolidated Fund without Parliamentary approval by way of a Supply Act for the implementation of a project, however laudable, the legality of such a move would then be incapable of being tested or challenged by a public-spirited citizen or a tax payer as in *Ex parte Smedley and Finlay v. Canada*. The courts must therefore be cautious in accepting any postulate that purports to narrow the rights of recourse to them and, in the present context, in constricting the concept of standing in public law in litigation, and will have to be ready to sharpen their constitutional knives as and when the occasion demands.